Department of the Treasury	Internal Revenue Service	Office of Chief Counsel	**N o t i c e**

CC-2010-009

May 11, 2010

Subject:	Disclosures of Returns and Return Information in Bankruptcy Cases	**Cancel Date**:	Upon incorporation into the CCDM

I. Purpose

This Notice advises employees in the Office of Chief Counsel on the scope of disclosures, under section 6103(h), of returns and return information, collectively "tax information," that may be made to the Department of Justice in bankruptcy cases.

II. Summary

Section 6103(a) of the Internal Revenue Code generally prohibits the Service from disclosing tax information, except as explicitly authorized by the Code. Section 6103(h)(2) authorizes the Service to make certain disclosures to DOJ in matters pertaining to tax administration, after a referral of a case pursuant to section 6103(h)(3).

The Code broadly defines "tax administration" in section 6103(b)(4) to include, among other activities,

> the administration, management, conduct, direction and supervision of the execution and application of the internal revenue laws or related statutes[1] (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party … [including] assessment, collection, enforcement [and] litigation … functions under such laws, statutes, or conventions.

See, e.g., United States v. Mangan, 575 F.2d 32 (2d Cir.), *cert. denied*, 439 U.S. 931 (1978). Not every bankruptcy case qualifies as a tax administration proceeding. Unlike Tax Court or refund proceedings, when the cause of action *per se* involves tax administration, bankruptcy cases are multi-party actions that may or may not involve the resolution of tax claims or the application of the internal revenue laws. There must be a nexus between the bankruptcy proceeding and the application of the internal revenue laws in the proceeding in order to consider the bankruptcy case a tax administration proceeding. If the bankruptcy is a tax administration proceeding, then

[1] The Bankruptcy Code (B.C.) provisions would be "related statutes," for example, to the extent they are utilized in determining the validity or amount of the Service's tax claim.

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disclosures of tax information may be made to DOJ, to the extent authorized by section 6103(h)(2)(A) - (C).

III. Discussion

Q.1. What Code sections permit the Service to disclose tax information to DOJ in bankruptcy cases?

A.1 Section 6103(h)(2) permits certain disclosures to DOJ only in matters pertaining to tax administration, which include certain bankruptcy cases. In order for any disclosures to be made to DOJ in a bankruptcy case that pertains to tax administration, the matter must be referred to DOJ for its representation or advice. I.R.C. § 6103(h)(3)(A).[2]

Q.2. When is a bankruptcy case a tax administration proceeding?

A.2. It is not uncommon for a debtor to be under audit at the time a petition is filed or for the bankruptcy petition to trigger an audit of the debtor in large bankruptcy cases. The Service's examination of the debtor, as a taxpayer, is a tax administration proceeding, but that does not automatically make the bankruptcy itself a tax administration proceeding. In general, a bankruptcy case pertains to tax administration if the bankruptcy court's involvement is or may be needed to determine a matter pertaining to assessment or collection of tax, or is otherwise needed to enforce the internal revenue laws. When that nexus is established will depend upon the facts of the bankruptcy case.

Some bankruptcy cases may pertain to tax administration immediately upon the filing of the petition. For example, if the debtor lists the Service as a creditor on its schedule of liabilities or in its plan of reorganization, then the bankruptcy pertains to tax administration. Other examples include when the Service has a current notice of federal tax lien filed against the debtor's property prior to the petition's filing, or if it is apparent that the trustee or debtor-in-possession will operate a business post-petition (*e.g.*, there is an existing sole proprietorship and the debtor has filed a Chapter 13 proceeding, or the debtor has filed a non-liquidating Chapter 11). In each of these examples, the Service has a tax interest in the bankruptcy case from the moment the petition is filed. Once the Service makes a referral to DOJ under section 6103(h)(3)(A) to defend that tax interest, disclosure of tax information, as described in section 6103(h)(2)(A) - (C), is authorized. If the Service decides not to pursue its interests in the case, however, no referral to DOJ for representation would be appropriate and no disclosures of tax information to DOJ should be made.

Some bankruptcy cases may become tax administration proceedings after the petition is filed. For example, the debtor may file a motion to determine tax liabilities under B.C. § 505, or initiate a preference action against the Service under B.C. § 547. Alternatively, the Service may determine that it is or may be necessary to file a proof of claim, request payment of administrative expenses, or take some action in the case to invoke the jurisdiction of the bankruptcy court, such as filing a motion to extend the bar date, lift the automatic stay, or object to a proposed plan. Any

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[2] Section 6103(h)(3)(A) describes Service-initiated referrals, which are used in most tax administration cases that the Service brings against taxpayers. It is possible, however, for DOJ to initiate a referral, pursuant to section 6103(h)(3)(B). This form of referral requires a written request for tax information from the Attorney General, Deputy Attorney General, or Assistant Attorney General, personally. The written request for tax information must also state the need for the disclosure. DOJ-initiated referrals are extremely rare, and still require that the proceeding pertain to tax administration.

of these determinations establish that the bankruptcy court's involvement is necessary and makes the bankruptcy case a tax administration proceeding. The Service may also make the bankruptcy case a tax administration proceeding by requesting the Tax Division's representation in negotiating a stipulation with the debtor.

Q.3. When should the Service request DOJ's representation in a bankruptcy case?

A.3. Generally, the Office of Chief Counsel requests DOJ's representation when it determines that doing so is appropriate or helpful to protect the Service's interests in a bankruptcy case.

Q.4. Once it has been decided that DOJ's representation is needed in a bankruptcy case, what is the next step?

A.4. Once the Office of Chief Counsel has decided that DOJ's representation is needed in a bankruptcy case, a referral to DOJ is required. I.R.C. § 6103(h)(3)(A).

Q.5. Once a referral to DOJ has been made, what information may be disclosed?

A.5. The rules for disclosures in tax administration proceedings were structured for traditional judicial tax proceedings, when the United States and the taxpayer are the only parties before the court and tax issues are the predominant, if not the sole, reason for the proceeding; *i.e.*, Tax Court and refund cases. The rules in section 6103(h) are not well suited to a bankruptcy case, which is a multi-party proceeding that often involves non-tax issues as well as tax claims. For example, under the literal terms of section 6103(h)(4)(A), the government has the authority, but not the obligation, to disclose all of a debtor's tax information to a creditor who has filed a proof of claim, even if the information has no relation to the tax years at issue or the government's tax claim, since the statute only requires that the taxpayer be a party to the proceeding. Nonetheless, in bankruptcy proceedings, attorneys should consider the rules of evidence and other rules governing discovery and disclosure-related matters, as well as what information might assist DOJ in the handling of a matter involving tax administration, to determine the extent of the debtor's tax information that is appropriate and helpful to the resolution of the matter. The tax information of a person other than the debtor may also be disclosed to DOJ if it satisfies the item or transaction tests provided in section 6103(h)(2)(B) - (C). When DOJ is litigating an adversary proceeding or contested matter in a bankruptcy case, Counsel should generally provide information requested by the DOJ. If, however, it is determined by Counsel that the information requested would not assist DOJ in the handling of a matter of tax administration, an appropriate-level official meeting should occur between DOJ and Counsel.

Q.6. May a Chief Counsel attorney disclose tax information to DOJ before making a referral?

A.6. The Service may communicate with DOJ before a referral when the Office of Chief Counsel determines that consultation with DOJ on a limited issue or issues is necessary, but these occurrences are expected to be infrequent. For example, the Service may consult with DOJ before a referral on whether DOJ would support a proposed motion in a particular proceeding. These types of consultations with DOJ require that disclosures are necessary for purposes of tax administration and that the scope of tax information to be disclosed be no more than that authorized in section 6103(h)(2). The internal determination to consult with DOJ before a referral must be documented for the case file and approved by the same level of authority that would authorize a referral.

Q.7. What if the Service expects the debtor to object to its claim that has yet to be filed — is that enough for the bankruptcy case to be a tax administration proceeding and refer the matter to DOJ?

A.7. In general, the proof of claim or some other event requiring Bankruptcy Court involvement should occur before preparing a referral and making disclosures to DOJ (see A.3). In certain bankruptcy cases, however, such as those involving a listed transaction, an underfunded pension plan, or other issues of similar factual or legal complexity, the Service may reasonably anticipate filing a proof of claim and that the claim, once filed, will face substantial objections. If the Service delays disclosing tax information to DOJ until the time that the proof of claim is filed, DOJ may not have enough time to become well versed in the complicated transactions or issues in order to defend the Service adequately in the case. In these circumstances, which are expected to be infrequent, the Service may consult with DOJ regarding the appropriate actions that DOJ may take on behalf of the Service before the proof of claim is filed.

Q.8. What are the procedures if the debtor is under audit and the Service is uncertain whether it will file a claim or if the matter does not yet pertain to tax administration?

A.8. Early motions filed by the debtor or other creditors may potentially affect the interests of the Service. For these cases, the Service often relies on DOJ to inform it about motions filed in pending bankruptcy proceedings, such as motions for adequate protection, to grant security interests or superpriority, to schedule the bar date, etc. The Service may send a letter to DOJ upon receipt of a bankruptcy petition, informing DOJ that the Service has been notified of the new bankruptcy case and generally requesting DOJ's assistance in monitoring motions filed in the proceeding. This letter is <u>not</u> a referral because the bankruptcy court's jurisdiction has not yet been invoked nor has the Service yet determined that DOJ's representation is needed. As a result, the Service may not disclose to DOJ whether the Service is planning on filing a claim, if the debtor is a taxpayer under examination, or any other tax information pertaining to the debtor (except under the circumstances described in A.7).

PACER may also be monitored for any motions filed in bankruptcy proceedings. If there is a motion that requires an appearance by the government, a referral should be made requesting that DOJ represent the Service. An ongoing examination may also provide reason to make a referral. For example, if the Service decides it needs more time to complete the taxpayer's examination so it may file a claim, then a referral may be made requesting that DOJ file a motion to extend the bar date.

Q.9. May DOJ be told that a debtor is currently under audit?

A.9. If the answer is yes to each of the following questions, then DOJ may be advised that the debtor is under audit:

1. Does the bankruptcy pertain to tax administration?
2. Has an appropriate referral been made?

Q.10. If a debtor who recently filed for bankruptcy is currently under examination and the audit is not going to be resolved by the bar date, what procedures should be followed?

A.10. The Service should determine whether to file a motion to extend the bar date. Once the decision is made to seek an extension, a referral should be made to request DOJ's

representation. After that referral is made, the items of the debtor's tax information appropriate and helpful to support such a motion, such as a description of the complexity of the audit, the involvement of the listed transactions, etc., may be disclosed to DOJ. The tax information of a person other than the debtor may also be disclosed to DOJ if it satisfies the item or transaction tests provided in section 6103(h)(2)(B) - (C).

Q.11 After DOJ has successfully moved the bar date, the Service elects to file a proof of claim in the bankruptcy case. Does the Service need to make another referral to DOJ to represent its interests in the bankruptcy case?

A.11 No. A referral has already been made. As such, the Service may request DOJ's assistance to support its interests in the bankruptcy case and, in conjunction therewith, may disclose to DOJ all of the debtor's tax information that is appropriate and helpful to support the Service's proof of claim. The tax information of a person other than the debtor may also be disclosed to DOJ if it satisfies the item or transaction tests provided in section 6103(h)(2)(B) - (C).

Q.12. An LMSB taxpayer files for bankruptcy along with 150 related entities, only some of which are part of the consolidated group. The debtors agree to a stipulation that will allow the Federal government to negotiate a combined proof of claim from the Service for the entire consolidated group, since all are severally liable for the liabilities. When may the matter be discussed with DOJ?

A.12. First, it must be determined that the bankruptcy case is a tax administration proceeding. Here, the request for a stipulation makes the bankruptcy case a tax administration proceeding even though the Service has yet to file a claim. Second, it must be determined that DOJ's representation is appropriate and helpful in the matter. A referral may be made and the tax information of related entities outside the consolidated group may be disclosed to DOJ so long as the information is appropriate and helpful to fulfill the purpose of the referral and meets the requirements of section 6103(h)(2)(A) - (C).

Q.13. A DOJ attorney who has become aware of the bankruptcy filing by a highly visible individual taxpayer contacts our office and asks what the Service plans to do in the case. Nothing in the bankruptcy filing indicates that the case pertains to tax administration. There is an ongoing audit, but the agent thinks that the issues will be agreed. May this information be disclosed to the DOJ attorney?

A.13. No. The DOJ attorney should be informed that, pursuant to section 6103, the Service cannot currently disclose any tax information regarding the debtor. The DOJ attorney may also be informed that, pursuant to our procedures, if the Service later determines that it will be filing a motion or a proof of claim in the bankruptcy, the Service will contact DOJ for its assistance and representation at that time.

Q.14. A DOJ attorney calls our office regarding a motion for post-petition financing in a recently-filed Chapter 11 and asks whether the Service objects. The Service has a secured claim. What are the Service's options?

A.14. If a referral has already been made and the Service wants to object to the post-petition financing, the Service may request that DOJ object to the motion on its behalf and, in conjunction therewith, may disclose all of the debtor's tax information that is appropriate and helpful. The tax information of a person other than the debtor may also be disclosed to DOJ if it satisfies the item or transaction tests provided in section 6103(h)(2)(B) - (C). Alternatively, if the Service has no

objection to the proposed post-petition financing, it may so inform DOJ.

If a referral has not yet been made and the Service objects to the proposed post-petition financing, the Service may make a referral to DOJ, asking DOJ to file an objection to the motion on its behalf and, in conjunction therewith, may disclose all of the debtor's tax information that is appropriate and helpful. The tax information of a person other than the debtor may also be disclosed to DOJ if it satisfies the item or transaction tests provided in section 6103(h)(2)(B) - (C). Alternatively, if the Service has no objection to the proposed post-petition financing, it may so inform DOJ, but because no referral has been made, the Service may not disclose tax information in conjunction with this notification.

Q.15. The Service is currently pursuing summons enforcement in federal district court against several entities that are under investigation for promoting abusive tax avoidance schemes. Some of the entities file Chapter 11 and immediately propose a sale of the "business" as a going concern; part of the proposal would involve the transfer of books and records to a new entity. The entities in Chapter 11 owe no taxes and there is insufficient information to estimate penalties under section 6700. What may the Service do to oppose the sale and prevent the transfer of records?

A.15. The Service should consider whether to file an objection to the proposed sale. The decision to file the objection provides the nexus that makes the bankruptcy case a tax administration proceeding. Thereafter, the Service may make a referral, asking DOJ to represent the Service before the bankruptcy court. The Service should disclose the debtor's tax information that DOJ needs to represent the Service's interests. Third-party tax information may be disclosed as authorized by section 6103(h)(2)(B) - (C). The Chief Counsel attorney assigned to the bankruptcy case should coordinate these actions with the attorneys assigned to the summons enforcement actions.

Q.16. DOJ informs the Service that a motion to sell property has been scheduled for hearing next week in the bankruptcy of an LMSB taxpayer. The Service's proof of claim will not be completed by that time, but it may be possible to prepare an estimated proof of claim before the hearing. Strategically, however, the Service is uncertain whether such an action is wise in this particular case. What may be discussed with DOJ?

A.16. If DOJ's representation is appropriate and helpful for the motion hearing, a referral should be made. After obtaining the same level of approval necessary for a referral, the Service may consult with DOJ on the timing of the Service's proof of claim filing. Only the debtor's tax information that is needed to facilitate the consultation on the issue should be disclosed to DOJ. Third-party tax information may be disclosed as authorized by section 6103(h)(2)(B) - (C).

Q.17. The Service initiated an examination of an LMSB taxpayer upon receipt of the bankruptcy petition and has discovered that the debtor was involved in a complex listed transaction that affects the Service's potential proof of claim. When can a referral be made to DOJ?

A.17. The timing of the referral depends upon the facts and circumstances of each case. The Service may consult with DOJ on the timing and scope of the Service's proof of claim filing. The referral for DOJ's representation should be made in sufficient time for appropriate representation of the Service's interests.

If you have any questions regarding the matters discussed in this Notice, please contact Mary Ellen Keys, Procedure & Administration, at (202) 622-4570.

/s/
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